Young v. Nortex Foundation Designs, Inc., 020713 TXCA2, 02-11-00470-CV

Adam Young, Appellant

v.

Nortex Foundation Designs, Inc., Appellee

No. 02-11-00470-CV

Court of Appeals of Texas, Second District, Fort Worth

February 7, 2013

From the 17th District Court of Tarrant County (17-247195-10) February 7, 2013 Opinion by Justice Gabriel

PANEL: WALKER, MCCOY, and GABRIEL, JJ.

MEMORANDUM OPINION [1]

LEE GABRIEL JUSTICE

I. Introduction

In three issues, Appellant Adam Young appeals the trial court's granting of Appellee Nortex Foundation Designs, Inc.'s motion for judgment notwithstanding the verdict (JNOV). We reverse and render.

II. Factual and Procedural Background

Young began working for Nortex as a drafter in 2001. He helped design foundation plans based on copyrighted architectural plans provided to him by Nortex. In 2010, Nortex gave Young a plan bearing a black stamp stating, "IF THIS STAMP IS NOT RED IT IS AN ILLEGAL SET OF PLANS, " and "REPRODUCTION OF THESE PLANS BY ANY MEANS IS PROHIBITED BY FEDERAL LAW, " and providing that violations could be punished by fines up to $100, 000. Young testified that in his around ten years with Nortex, he had otherwise never received a plan with such a stamp, and Seth Witworth, one of Nortex's office managers, testified that most plans came to Nortex without a stamp.

Young told Debbie Ingram, the office manager to whom he reported, that he was uncomfortable designing the foundation because of the black stamp, and she told him that she would take care of it. Young said that Witworth subsequently brought the plan back to him and another drafter, Adam Davidson, and told them that Bob Lemke, Nortex's president, did not care who prepared the plan but that it needed to be done. Davidson likewise was concerned about the black stamp and, like Young, would not proceed with the assignment. Young refused to draw the design and put Ingram's name on it because he believed that would falsify the plan. Lemke relayed through Witworth that if Young was unwilling to do the work, then he did not have any work for him.

According to Young, he was never told that the builder had the red-stamped copy of the plan. Witworth told Young that the builder told him that the homeowner had the red-stamped copy of the plan. Witworth testified that Lemke told him that Nortex was not going to get the red-stamped plan and that this was a business decision. Young again responded that he was not comfortable using the plan containing a black stamp and illegal plan notation, and he testified that after his meeting with Ingram and Witworth, he was terminated and escorted from the building. Witworth testified that after Young sued Nortex for wrongful termination, Nortex obtained the red-

stamped plan.

In its first motion for summary judgment, which the trial court denied, Nortex claimed that its request that Young prepare the foundation plan would not have resulted in the imposition of criminal liability. In its second motion, which the trial court also denied, Nortex asserted that its request did not ask him to perform an illegal act because the homeowner for whom the work was ultimately performed had previously purchased the architectural plan, which was only used by her for building her own home. When the case eventually went to trial, Nortex moved for a directed verdict, which the trial court also denied.

The jury found that Young had been discharged because he refused to perform an illegal act, and it awarded him damages in excess of $300, 000. Nortex then filed a motion for JNOV, stating that it could legally reproduce the foundation design because the homeowner had the original plan and that therefore, Young had never been asked to perform an illegal act. The trial court granted Nortex's motion for JNOV and this appeal followed.

III. Discussion

In his first issue, Young asserts that the trial court erred by granting JNOV for Nortex because the *Sabine Pilot* exception to the at-will doctrine applies to a case in which an employee is forced to choose between the risk of criminal liability and being discharged from employment. *See Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733, 735 (Tex. 1985) (holding that public policy requires a very narrow exception to the employment-at-will doctrine, covering only the discharge of an employee for the sole reason that the employee refused to perform an illegal act); *Johnston v. Del Mar Distributing Co.,* 776 S.W.2d 768, 771 (Tex. App.—Corpus Christi 1989, writ denied) (applying *Sabine Pilot when* an employee was fired for inquiring into whether or not she was committing illegal acts). Specifically, Young complains that
because Nortex refused to attempt to obtain a red-stamped copy of the plan and because Young was not willing to take on that risk of using the plan he believed to be illegal, he was in fact terminated by Nortex. Young was therefore required to choose between risking criminal liability by using the plan that clearly stated it was an illegal copy or lose his livelihood.

Nortex responds that the JNOV was appropriate, and the *Sabine Pilot* exception was inapplicable, because Young failed to establish that he was asked to perform an illegal act, and that that there is no good faith exception under *Sabine Pilot.*

A. Standard of Review

A trial court may disregard a jury verdict and render a JNOV if no evidence supports the jury finding on an issue necessary to liability or if a directed verdict would have been proper. *See* Tex. R. Civ. P. 301; *Tiller v. McLure,* 121 S.W.3d 709, 713 (Tex. 2003); *Fort Bend Cnty. Drainage Dist v. Sbrusch,* 818 S.W.2d 392, 394 (Tex. 1991). A directed verdict is proper only under limited circumstances: (1) when the evidence conclusively establishes the right of the movant to judgment or negates the right of the opponent; or (2) when the evidence is insufficient to raise a material fact issue. *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.,* 29 S.W.3d 74, 77 (Tex. 2000); *Playoff Corp. v. Blackwell,* 300 S.W.3d 451, 454 (Tex. App.—Fort Worth 2009, pet. denied) (op. on reh'g).

To determine whether the trial court erred by rendering a JNOV, we view the evidence in the

light most favorable to the verdict under the well-settled standards that govern legal sufficiency review. *See Ingram v. Deere,* 288 S.W.3d 886, 893 (Tex. 2009); *Wal-Mart Stores, Inc. v. Miller,* 102 S.W.3d 706, 709 (Tex. 2003). We must credit evidence favoring the jury verdict if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *See Tanner v. Nationwide Mut. Fire Ins. Co.,* 289 S.W.3d 828, 830 (Tex. 2009); *Cent. Ready Mix Concrete Co. v. Islas,* 228 S.W.3d 649, 651 (Tex. 2007).

B. *Sabine Pilot*

Texas has been an at-will employment state since at least 1888, when the supreme court held that absent a contractual agreement to the contrary, an employee employed for an indefinite term could be terminated at will without cause. *See E. Line & R.R.R. Co. v. Scott,* 72 Tex. 70, 75, 10 S.W. 99, 102 (1888). In 1985, however, in *Sabine Pilot,* the supreme court affirmed a case from the Beaumont court of appeals to create an exception to the at-will employment doctrine. 687 S.W.2d at 735, *aff'g Hauck v. Sabine Pilots, Inc.,* 672 S.W.2d 322 (Tex. App— Beaumont 1984, writ granted).

In *Sabine Pilot,* Sabine Pilot Services instructed Michael Hauck, one of its deck hands, to pump bilge from Sabine's boat into the water, which was an illegal act. *Id.* at 734. After confirming with the coast guard that the act was illegal, Hauck refused to perform it, and Sabine Pilot fired him. *Id.* Hauck sued Sabine Pilot for wrongful discharge, and the trial court granted summary judgment. *Id.* The Beaumont court of appeals reversed the trial court's judgment, and the supreme court affirmed the court of appeals's judgment, stating,

We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in *East Line & R.R.R. Co. v. Scott.* That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

Id. at 735; *see also Winters v. Houston Chronicle Publ'g Co.,* 795 S.W.2d 723, 724 (Tex. 1990) (stating that an employee should not be "unacceptably forced to choose between risking criminal liability or being discharged from his livelihood").

"The Texas Supreme Court created this tort to promote the public policy of preventing an employee from being forced to choose between keeping his job and facing criminal liability." *Physio GP, Inc. v. Naifeh*, 306 S.W.3d 886, 888 (Tex App—Houston [14th Dist] 2010, no pet); see also Higginbotham v Allwaste, Inc, 889 S.W.2d 411, 413 (Tex App—Houston [14th Dist] 1994, writ denied) ("[W]hen an employer asks an employee to perform some act which is illegal, he automatically puts the employee to the 'unacceptable' choice of risking criminal liability or being discharged because the employee is placed under the onus of being terminated for insubordination") Were the court to hold otherwise, it would "promote a thorough disrespect for the laws and legal institutions of our society" Sabine Pilot, 687 S.W.2d at 735 (Kilgarlin, J, concurring).

C. Analysis

The spirit of the often-enunciated *Sabine Pilot* exception to the at-will employment doctrine is that an employee should not be forced to choose between the risk of participating in a criminal act

or being discharged. However, the court of appeals and the supreme court in the original *Sabine Pilot* case were not faced with the situation that we have before us. We have not found, and we have not been directed to any cases, in which the employer itself, in essence, tells the employee that the act he is being directed to perform is illegal—here by providing him with paperwork indicating his work based on that paperwork will be illegal—and then does not assuage his concerns about illegality by producing the legal paperwork, which it could have produced before firing him but did not, and then later asserts in litigation that the act was legal after all. Nevertheless, our supreme court has spoken in clear and unambiguous terms from which it has not retreated—the act that the employee is asked to perform must be illegal. *Winters,* 795 S.W.2d at 724-25; *see also Safeshred, Inc. v. Martinez,* 365 S.W.3d 655, 659-60 (Tex. 2012) (noting that the court has consistently refused to expand *Sabine Pilot* beyond the narrow exception set out in that case); *The Ed Rachal Found, v. D'Unger,* 207 S.W.3d 330, 332 (Tex. 2006) *("Sabine Pilot* protects employees who are asked to *commit* a crime."); *Morales v. SimuFlite Training Int'l, Inc.,* 132 S.W.3d 603, 608-10 (Tex. App.—Fort Worth 2004, no pet.) (reversing summary judgment based on *Sabine Pilot* when there was a genuine issue of material fact with regard to whether what the employer asked the employee to perform was an illegal act subjecting him to criminal penalty as an aider or abettor).

Criminal copyright infringement requires proof of four elements: (1) a valid copyright; (2) infringement of that copyright; (3) willfulness; and (4) the infringement was either: (a) for purpose of commercial advantage or private financial gain or (b) by reproduction or distribution of copyrighted works with a total retail value of more than $1, 000. 17 U.S.C.A. § 506(a) (2008). The parties do not dispute that the plan in this case was validly copyrighted. The black- stamp copy provided to Young made clear that it was copyrighted, and had Young used the black-stamped plan, he would have done so willfully in spite of the clear warning. Because it was in the course of his employment, he also would have used the plan for the purpose of financial gain. The only question, then, is whether using the black-stamped copy, when the homeowner had purchased and owned the legal, red-stamped copy, was an infringement of the copyright.

The owner of the copyright has the exclusive right to authorize reproductions of the copyrighted work or to prepare derivative works based upon the copyrighted work. *See id.* § 106(1)-(2) (2005). The holder may grant to others a license to use the copyrighted work. "In an exclusive license, the copyright holder permits the licensee to use the protected material for a specific use and further promises that the same permission will not be given to others. The licensee violates the copyright by exceeding the scope of this license." *I.A.E., Inc. v. Shaver,* 74 F.3d 768, 775 (7th Cir. 1996). The copyright holder in this case (the creator of the architectural plan) granted the homeowner a license to make reproductions and derivative works from red-stamped copies. The holder did not grant the licensee the right to use black-stamped copies. To use black-stamped copies therefore would be to exceed the scope of the license granted and would violate the copyright.

The criminal copyright infringement statute provides no explicit statutory defenses. *See* 17 U.S.C.A. § 506. Nortex's argument that it had valid copies of the plan is an affirmative defense to a claim of copyright infringement. *See Carson v. Dynegy, Inc.,* 344 F.3d 446, 451 n.5 (5th Cir. 2003)

("As the existence of a license authorizing the use of copyrighted material is an affirmative defense to an allegation of infringement, Dynegy bears the burden of proving that such a license exists."); *U.S. v. Cross,* 816 F.2d 297, 303 (7th Cir. 1987) ("In order to understand the meaning of criminal copyright infringement it is necessary to resort to the civil law of copyright."). However, this affirmative defense does not change the fact that Nortex asked Young to commit a crime by using a black-stamped copy, refused to provide him with the legal red-stamped copy, and fired him when he would not use the unlicensed copy. *See* 17 U.S.C.A. § 506(a). This is precisely the situation to which *Sabine Pilot* was meant to apply. *See Sabine Pilot,* 687 S.W.2d at 735.

The evidence at trial established that only red-stamped copies were licensed to be used by Nortex's drafters and that Young was required to work from a copy other than the valid red-stamped plan. The trial court therefore erred by granting JNOV for Nortex. *See Prudential Ins.,* 29 S.W.3d at 77. We sustain Young's first issue. Because Young's first issue is dispositive, we do not need to reach his other two issues. *See* Tex. R. App. P. 47.1.

IV. Conclusion

Having sustained Young's dispositive issue, we reverse the trial court's judgment granting JNOV for Nortex and render judgment for Young in accordance with the jury's verdict. *See Tanner v. Nationwide Mut. Fire Ins. Co.,* 289 S.W.3d 828, 834 (Tex. 2009).

MCCOY, J., filed a dissenting opinion.

DISSENTING MEMORANDUM OPINION [1]

MCCOY, J.

I respectfully dissent. I would hold that the issue of illegality and criminal penalty is not before this court, that the "good faith belief"[2] exception to *Sabine Pilot* is not a correct expression of the law, and that as a result, the failure to submit an issue on good faith belief was not error, resulting in an affirmance of the trial court's judgment. I would also observe that this resulting affirmance is less than satisfying because absent estoppel, it theoretically allows an employer to tell a worker that the act he is directed to perform is illegal, then fire him when he refuses to perform, and only then, after the fact, reveal that the act was not illegal. And, all the while, the employer does not subject itself to liability because there was no illegal act. It is for the legislature or the supreme court, however, to address this situation.

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in the trial court's judgment. It is ordered that the judgment of the trial court is reversed and we render judgment for Appellant Adam Young in accordance with the jury's verdict.

It is further ordered that appellee Nortex Foundation Designs, Inc. shall pay all costs of this appeal, for which let execution issue.

Notes:

[1] See Tex.R.App.P. 47.4.

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[2] *Johnston v. Del Mar Distrib. Co.* , 776 S.W.2d 768, 771 (Tex. App.— Corpus Christi 1989, writ denied).
